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Recent Developments in Nova Scotia Insurance Law

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Notes and Comments

James A. Rendall*

Recent Developments
In Nova Scotia
Insurance Law

I. Introduction

Insurance is a prolific area of the law in terms of litigation. Many more judgments have been handed down in Nova Scotia recently than could be reviewed profitably in an article of reasonable length.

In an attempt to review a representative sample of the range of insurance problems currently occupying Nova Scotia courts, Part II of this article deals with a variety of cases arranged under six headings. The topics represented have been chosen by reason of their recurrent enduring importance in insurance law, as with "insurable interest", by reason of current importance to the legal profession, as with "limitation periods", or by reason of intriguing new developments, as with "subrogation".

Part III focuses at some length on automobile insurance. Several of the most important recent Nova Scotia cases have been in this area, and two of the most important automobile insurance cases in Canada have been Nova Scotia cases.

Part III also exposes some of the problems which presently beset our automobile liability insurance code, and this theme is developed in Part V.

Legislative developments in the area of insurance law are canvassed in Part IV which also serves to introduce some of the matters explored in Part V.

Most of the cases discussed are judgments of the Nova Scotia courts but several Supreme Court of Canada judgments of considerable importance are included. A couple of Ontario cases, including a County Court judgment, are also included because of the new directions they appear to be taking, directions which could be of very real concern if followed in Nova Scotia.

Finally, it should be noted that in this article, "recent" means, roughly, within the past four years. Most of the cases are judgments delivered since the beginning of 1975, but I have occasionally cast

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my net wider to retrieve important earlier cases. This seemed reasonable in view of the fact that insurance law was not surveyed in the last special issue of this journal.

II. *Insurance Case Law Generally*

1. *Accident*

Probably no other word has generated more insurance litigation than has "accident". The cases determining whether loss or damage has been "caused by accident" or whether death was "accidental" are fascinating, sometimes confused, and seemingly numberless.

A recent judgment by MacIntosh J. in *Veinot v. The Maritime Life Assurance Company*¹ applied the now well-established principle that the injury victim cannot claim that his loss was "accidental" if he has "deliberately courted the risk" or if his "reckless conduct" has provoked the action which caused the loss. The holding is not remarkable, but the case is worth reading as an illustration of the endless kaleidoscope of human affairs which may give rise to the issue and, more importantly, as an example of the difference between intentional exposure to the risk and deliberate courting of the risk.

Barry Veinot had pursued his estranged wife, Corinne, and his brother, Charles, at high speed over slippery roads. Arriving at the home which Corinne and Charles were visiting, Barry forced his way in despite obstruction by the homeowner. During the altercation at the door, Charles Veinot had loaded a shotgun and warned Barry to leave. There was some conflict of evidence, but the Court accepted the view that Barry Veinot moved toward his brother who then fired the gun inflicting such serious injury that the plaintiff's right leg was later amputated.

The plaintiff claimed under a policy which agreed to compensate him for "bodily injury sustained accidentally".

MacIntosh J. relied on two cases, *Travellers Insurance Co. v. Elder*² and *Trynor Construction Company Ltd. v. The Canadian Surety Company*³.

In the *Elder* case the insured authored his own misfortune very much like Barry Veinot. When he tried to help himself to another

1. (1976), 22 N.S.R. (2d) 84 (S.C., T.D.)

2. [1940] 2 D.L.R. 444; 68 Que. K.B. 335 (C.A.)

3. (1970), 1 N.S.R. (2d) 599; 10 D.L.R. (3d) 482; [1970] I.L.R. 1-356 (S.C., A.D.)

pickle and used abusive language toward a restaurant employee the latter threw a glass tumbler at his face. His injury was held not to be accidental.

In *Trynor* the insured's truck was damaged when a bridge collapsed under the truck and a bulldozer which it was carrying. The insured's employees had stopped and tried to assess the capacity of the bridge to carry the load. Thus, they were aware of the risk and took a deliberate decision to attempt to cross the bridge. The loss was found to be "accidental" in that the insured's employees had exercised their best judgment.

Veinot confirms, as did *Trynor*, that in distinguishing "accident" from "deliberate courting of the risk" the degree of recklessness in the insured's conduct will be of critical importance.

"Accident" was also at issue, but in a more unusual context, in *Pickford & Black Ltd. v. Canadian General Insurance Co.*⁴ In this case a stevedoring firm, Pickford & Black Limited, were insured against liability for damage to property "resulting solely and directly from an accident due to the operations of the Insured". The policy contained an exclusion in respect of "Accident occurring outside the Dominion of Canada and the United States of America".

Pickford & Black loaded some heavy electrical equipment belonging to Canadian General Electric Co. Ltd. aboard a ship in Halifax harbour. After a day at sea, and at a time when the ship was outside the territorial limits of Canada and the United States, the cargo shifted and the electrical equipment was damaged. It was established that the cause of the cargo shifting was negligence in stowing the electrical equipment, and Pickford & Black was liable to Canadian General Electric for the damage.⁵

Canadian General Insurance Co. denied that this liability was covered by its policy. At the trial⁶ before Dubinsky J. it was argued for the insured that the "accident" was the negligent act of stowage, and not the shifting of cargo which resulted; thus, the "accident" took place in Halifax harbour. Dubinsky J. rejected this argument and agreed with the insurer's argument that the only event

4. [1977] 1 S.C.R. 261; 14 N.S.R. (2d) 181; 64 D.L.R. (3d) 179; [1976] 1 L.R. 1-732

5. *Canadian General Electric Co. Ltd. v. Pickford & Black Ltd.*, [1971] S.C.R. 41; 2 N.S.R. (2d) 497; 14 D.L.R. (3d) 372

6. (1974), 10 N.S.R. (2d) 517; 42 D.L.R. (3d) 360; [1974] 1 L.R. 1-610 (S.C., T.D.)

or occurrence which could be described as "accidental" was the cargo shifting at sea.

However, Dubinsky J. gave judgment for the plaintiff on two grounds. First, he thought the exclusion clause did not apply to the policy endorsement under which the insured was claiming. Secondly, the "accident" could not be considered by itself but must be viewed in conjunction with the chain of causation leading to the "accident"; here that chain of causation led back to Halifax harbour.

This judgment was reversed by the Court of Appeal;⁷ an appeal to the Supreme Court of Canada was dismissed.⁸ Both appellate courts held that the exclusion did govern the endorsement under which the insured claimed and that the "accident" which was the shifting of cargo, took place at sea. Dubinsky J.'s view was rejected as involving a reading of "occurred" as though it said "originated".

So far as the definition of "accident" and the fixing of the place where it "occurred" is concerned the ultimate result in this case is probably unremarkable. But the case bears further discussion as an illustration of insurance contract formation practices which have so often produced litigation and which apparently will continue to do so.

The policy issued to Pickford & Black, entitled a "contractors public liability policy", was in fact designed to insure the company's liability "for damages because of bodily injury, sickness or disease . . . caused by accident . . . and resulting from or while at or about the work or operations of the Insured . . .". The property damage liability cover was added to the policy by endorsement. Dubinsky J. thought that the exclusion in respect of accidents outside Canada and the United States was inappropriate as applied to this endorsement and did not operate to cut down the cover given by the endorsement.

The way in which such policies are developed and the interpretive difficulties to which they give rise are well stated in these extracts from the decision of MacKeigan C.J.N.S., in the Court of Appeal judgment in *Pickford and Black*:

The insurance policy to be interpreted is the common

7. (1975), 10 N.S.R. (2d) 501; 53 D.L.R. (3d) 277; [1976] I.L.R. 1-720 (S.C., A.D.)

8. [1977] 1 S.C.R. 261; 14 N.S.R. (2d) 181; 64 D.L.R. (3d) 179; [1976] I.L.R. 1-732

hodge-podge of forms, conditions and added endorsements, selected without careful regard for the purpose intended⁹

. . . .

. . . . The policy is no gem of draftsmanship. . . . It is apparent that the underwriter took a printed form of contractor's public liability policy and adapted it as best he could to cover liability for both personal injury and property damage resulting from accidents due to the respondent's stevedoring operations at Halifax. The policy must be reasonably construed as a whole, to determine what the parties intended¹⁰

Even when its component parts are so diverse in their origin, and so awkward in their merger, it no doubt remains a correct guide to interpretation to try to construe the policy as a whole. However, it is surely increasingly euphemistic to speak of "what the parties intended" when, plainly, they gave no real thought to the exact nature of the risk being underwritten or to the effect on the risk intended to be covered of adding bits and pieces from a stockpile of various forms.

2. *Insurable Interest*

Although the courts have at times criticized insurable interest as a mean defence for an insurer the flow of cases in which insurable interest is argued continues unabated.

In *Sellers v. Continental Insurance Co.*¹¹ the insured, Ralph Sellers, had built his home on a piece of land title to which was held by Canso Concrete Products Limited, a wholly-owned subsidiary of Canso Excavators Limited, which was wholly owned by Sellers. In a transaction to finance the companies, the shares of Canso Excavators Limited were sold to Northside Freight Handlers Limited; the agreement for sale of the shares included a clause reciting that the house built on the land owned by Canso Concrete Products Limited belonged to Ralph Sellers. In the same clause Northside agreed to vote its shares of Canso Excavators and Canso Concrete Products so as to provide Sellers an opportunity to purchase the land on which the house stood, to a limit of four acres.

The house and contents were destroyed by a fire in which Sellers died. Continental Insurance Co. defended an action on the policy on

9. (1975), 10 N.S.R. (2d) 501 at 505; 53 D.L.R. (3d) 277 at 280; [1976] I.L.R. 1-720 at 2484 (S.C., A.D.)

10. *Id.* at 512; 53 D.L.R. (3d) at 285; [1976] I.L.R. at 2488

11. (1975), 48 D.L.R. (3d) 369; [1975] I.L.R. 1-657 (N.S.S.C., T.D.)

two grounds, first, that Sellers had no insurable interest in the house or contents, and second, that his interest was not as owner and his true interest was not stated in the policy. This defence, of course, is based on Statutory Condition #2 of the Fire Part of the Insurance Act.¹²

Cowan C.J.T.D. held that Sellers had an insurable interest in the house either on the basis that he had constructed it with his own money, though admittedly on land he did not own, or on the basis of his agreement with Northside pursuant to which he could purchase the land. Cowan C.J. also found that Sellers was interested in the house as "owner" so that there was no breach of Statutory Condition #2. The evidence of Sellers' purchase and ownership of the household furnishings seems to have been quite clear, and one wonders that the insurer would raise a defence seemingly so vexatious. As to the house, the argument of lack of insurable interest had considerable plausibility although the objection was purely technical as there is nothing in the case to suggest that what the insurer was really complaining of was misrepresentation or arson.

The fact, of course, is that the defence of lack of insurable interest is usually a technical defence and is frequently resorted to in order to mask objections more substantial but perhaps impossible to establish.

Cowan C. J.'s disposition of *Sellers*, and particularly the broad definition given "owner" and the slight attention paid to Statutory Condition #2, is to be contrasted with the Ontario case, *Marks v. Commonwealth Insurance Co.*¹³. In that case Mrs. Celia Marks was the registered owner of a residential property insured with Commonwealth Insurance Co. and purportedly rented to a tenant, Clarence Ross, through her agent, Herman Airst. Prior to the fire which destroyed the house, Clarence Ross had entered into an agreement with Isaac Airst to purchase the property from him.

Isaac Airst was Celia Marks' husband and Herman Airst was his brother.

The evidence at trial was confused and unreliable and left doubt whether Mrs. Marks was owner of the house, nominal owner and trustee for the Airst brothers, mortgagee, or whether she had any capacity recognized in law.

12. R.S.N.S. 1967, c. 148

13. (1974), 2 O.R. (2d) 237; 42 D.L.R. (3d) 481; [1974] I.L.R. 1-580 *aff g* [1972] I.L.R. 1-484 (C.A.)

The trial judge, Galligan J., held that Mrs. Marks was “purely a nominal owner and had no beneficial interest in the property” and thus had no insurable interest. The Court of Appeal agreed that the fact of being a “nominal owner” did not create an interest in the property.

The Court of Appeal also relied on Statutory Condition #2 of the Ontario Insurance Act¹⁴ which is in the same language as the Nova Scotia Statutory Condition:

2. Unless otherwise specifically stated in the contract the insurer is not liable for loss or damage to property owned by any person other than the insured, unless the interest of the insured therein is stated in the contract.

Evans J.A. said “The proper test . . . is not whether the appellant is the owner but whether the property is owned by others.”

This case created something of a stir concerning the doubt cast on a bare trustee’s right to insure, and the narrowing of the term “owner” to mean beneficial ownership.¹⁵ The reaction to *Marks* may have been misplaced. As one commentator conceded,

. . . uncertainty, on the part of the insurer, as to whether the insured or some other person is the owner of the property, is most material to the risk. In this view, the insurer may merely want to be informed at the outset that the insured, named in the contract of insurance, is holding the property in trust, for the benefit of others.¹⁶

This passage appears to correctly state the function of Statutory Condition #2, and also to provide the rationalization for the superficially different results in *Marks* and in *Sellers*. The insurer’s primary interest is in having a full disclosure of the extent of the named insured’s interest, and the identity of any other persons with an interest. Both items of information obviously bear on the moral hazard. In *Sellers*, although the insured did not have title to the land under his home, he had the full financial stake in the house and the judgment discloses no attempt by him to deceive the insurer. In *Marks* it was doubtful whether the named insured had any stake in the property, and the judgment records numerous deceptions by Mrs. Marks of counsel examining her for discovery. Galligan J.

14. R.S.O. 1970, c. 224. Statutory Condition #2 is imported into the contract by section 122. In the Nova Scotia Act the statutory condition is imported into the contract by section 121

15. See, case comment by H. Kirsh, (1974), 52 Can. B. Rev. 305 and by G. Brent, (1974), 52 Can.B.Rev. 604

16. H. Kirsh, (1974), 52 Can.B.Rev. 305 at 310

found that the property was over-insured and that the value stated was exaggerated. In short, although the defence of lack of insurable interest may be unpopular, and is always in danger of being a technical objection, Statutory Condition #2 seems to impose a salutary obligation on the insured and the cases suggest that a technical defence may sometimes do substantial justice.

Most of the concerns raised by *Marks* about the potentially oppressive application of Statutory Condition #2 should have been allayed by the later Supreme Court of Canada judgment in *Commerce & Industry Insurance Company of Canada v. West End Investment Company*.¹⁷ West End sold a hotel to Hector Charette and was owed a balance of the sale price exceeding \$50,000. Charette leased the building to Jeando Inc. and the latter undertook to insure. Through the intermediation of a broker and two agents, policies agreeing to pay to an aggregate limit of \$50,000 were issued by Commerce & Industry Insurance Company and several other companies on a subscription basis. The policies described Jeando Inc. as the insured and, in a clause purporting to relate to mortgage creditors, named "1. Hector Charette; 2. West End Investment Co.; as their interests may appear . . ."

After loss, the insurers resisted a claim on the policy on two grounds. First, it was said that Jeando Inc. had no insurable interest. Secondly, the insurers relied on the following statutory condition:

10. The company is not liable for the losses following, that is to say:

(a) For the loss of property owned by any other person than the assured, unless the interest of the assured is stated in or upon the policy;¹⁸

The Supreme Court of Canada held that Jeando Inc. had an insurable interest by reason of its undertaking in the lease to insure, and also by reason of its potential liability as tenant for loss caused by its negligence.

As to the defence based on the statutory condition, Pigeon J. noted that an insurance contract can be concluded informally, even orally, and that there is nothing to prevent an insurer from choosing not to require an insured to mention the nature of his interest. He then noted that the policies in question were issued, following a standard practice, without obtaining a written application from the insured.

17. (1976), 11 N.R. 541; [1976] I.L.R. 1-795 (S.C.C.)

18. From the Fire Part of the Insurance Act, R.S.Q. 1964, c. 295

Thus, the insured was given no chance to provide the information required by Statutory Condition #10(a) and, in the circumstances, a defence based on the statutory condition was simply an attempt to evade the insurer's obligation without showing prejudice.

Although this case came to the Supreme Court of Canada from the Quebec Court of Appeal, Pigeon J. noted that Quebec's Statutory Condition #10(a) was copied verbatim from an earlier version of Ontario's statutory condition which now appears in Ontario, Nova Scotia and other common law provinces as Statutory Condition #2 in the form noted above in the discussion of *Marks*. Pigeon J. also relied on two old Supreme Court of Canada cases arising under the Ontario Act, and the Nova Scotia Act, respectively. Thus, *Commerce & Industry Insurance Company of Canada v. West End Investment Company* should be reliable authority in Nova Scotia and should help to settle the meaning of "insurable interest" and to define the proper role of Statutory Condition #2 of the Fire Part of the Insurance Act.

The most disturbing insurable interest cases arise in connection with automobile insurance. Cases like *Wolfe v. Oliver*¹⁹ and *Stevens v. Bowser*²⁰ typify the all-too-common scenario in which one person buys an automobile and procures its registration in the name of another person who also insures the vehicle. In these cases a successful defence of lack of insurable interest redounds to the disadvantage not only of the vehicle owner, but also, more unfortunately, of his innocent injury victim.

These cases are reviewed in Part IV of this survey where the special problems arising under automobile insurance policies are considered.

3. *Limitation Period*

As with the defence of insurable interest, insurers frequently take advantage of a limitation period when their real reason for resisting payment is substantive but hard to establish. It is notorious that courts are loath to make a finding of arson, suicide or fraud. It is also common knowledge that insurers react to this judicial tendency by delaying tactics in cases in which arson, suicide or fraud is suspected.

19. (1974), 8 N.S.R. (2d) 313; 46 D.L.R. (3d) 380; [1975] I.L.R. 1-644 (S.C., A.D.)

20. (1974), 18 N.S.R. (2d) 440 (S.C., T.D.)

*Webb Real Estate Ltd. v. Canadian Surety Co.*²¹ provides an excellent step-by-step account of the delaying tactics used, successfully in that case, and serves as a chilling object lesson to lawyers.

Webb Real Estate and a related company were insured against loss by fire under two subscription policies underwritten by a total of thirteen insurance companies.

On June 1, 1973, the property covered by the policies was destroyed by fire and on the same day the solicitor for Mr. Webb (who owned both companies) took instructions and gave notice of the loss to the adjuster for all thirteen insurers. Hart J.'s judgment contains a four page summary of the correspondence, documents, demands, references, return of unsatisfactory forms, and other manoeuvres which ensued. A total of thirty-six proof of loss forms was required, and the insured was pressed to great lengths to comply with policy warranties concerning fire extinguishers and lightning rods.

Throughout Hart J.'s judgment there is no overt hint of arson, but one can't help remarking on the number and technical detail of the objections and demands of the insurers. In fact, arson was suspected and a police investigation was conducted. If Webb's solicitor was unaware of this he was apparently one of the few such naive souls in the town.

Two or three weeks after June 1, 1974, Webb's solicitor realized that the one-year limitation period under the policies had elapsed.

These limitation periods were imported into the policies by the following statutory condition:

14. *Action* — Every action or proceeding against the insurer for the recovery of any claim under or by virtue of this contract shall be absolutely barred unless commenced within one year next after the loss or damage occurs.²²

The plaintiff sought assistance under s. 25B of the Insurance Act²³ which gives the court discretion to relieve against forfeiture consequent upon imperfect compliance with a statutory condition. Following *Bacon American Corporation v. Orion Insurance Co. Ltd.*²⁴ and an established line of cases in the Western provinces, Hart J. held that s. 25B did not give him discretion to over-ride the

21. (1976), 60 D.L.R. (3d) 738; [1976] I.L.R. 1-760 (N.S.S.C., T.D.)

22. Statutory Condition #14, Schedule to Part VII of the Insurance Act

23. Added by S.N.S. 1966, c. 79, s.2

24. (1968), 67 D.L.R. (2d) 75; [1966] I.L.R. 1-226 (N.S.S.C., T.D.)

clear limitation expressed in Statutory Condition #14.

The sad sequel to this case was a successful action against the solicitor for professional negligence.

Thus, *Webb Real Estate* stands for, or gives rise ultimately to, four cautions.

1st the court cannot relieve against the consequence of missing a limitation period in the Insurance Act;

2nd missing a limitation period may amount to professional negligence;

3rd as an obvious practical guide, a solicitor should be doubly careful whenever there is a cloud on the insured's claim and the insurer seems to be unusually demanding in its requirements and slow in its processing of the claim;

4th the limitation period in Statutory Condition #14 of the Fire Part of the Act is by no means the only such hazard for the unwary lawyer.

Actions under accident and sickness insurance policies and under auto insurance policies must be launched within one year.²⁵ There are less specific, but probably equally dangerous, time periods to be observed as well. Any material change in the risk covered by an automobile insurance or a fire insurance policy must be "promptly" notified to the insurer.²⁶ Under an auto insurance policy the insured must give notice of loss "promptly",²⁷ and under a fire insurance policy notice of loss must be given "forthwith".²⁸ This is not a comprehensive compilation of the time hazards lurking in the Insurance Act. The message from *Webb Real Estate* is clear: whenever you are dealing with insurance policies, do not delay, and canvass the Act carefully.

4. *Proof of Death*

The fact of death is usually so incontrovertible and its time so susceptible of determination to a high degree of accuracy that it is easy to overlook the problems of proof facing a life insurance beneficiary when the life insured has mysteriously disappeared.

A review of those problems is provided by Dubinsky J.'s

25. See Statutory Condition #12 under s. 58, and Statutory Condition #6(3) in the Schedule to Part VI of the Act

26. See, Statutory Condition #1(1) in the Schedule to Part VI, and Statutory Condition #4 in the Schedule to Part VII of the Act

27. See, Statutory Condition #4(1) (a) in the Schedule to Part VI

28. See, Statutory Condition #6(1) (a) in the Schedule to Part VII

judgment in *Stanfield v. The Commercial Union Assurance Company Limited*.²⁹ The claimant must prove the death; there is no presumption of death before the expiration of seven years from the time the missing person was last seen or heard from; even when the seven-years' absence presumption operates, there is no presumption as to when, within the seven year period, death took place; if a claim depends on death having occurred at a specific time within the seven years, the onus of proof is on the claimant.

In the *Stanfield* case Paul Cyr had obtained a large policy on his life in October, 1973. Calculating days of grace, the policy expired February 16, 1974. Paul Cyr was last seen alive on February 4, 1974, when he left Louisburg in an unseaworthy vessel shortly before a severe storm.

A claim on the policy was resisted. The insurer, opposing a presumption of death, cited the fact of Cyr's criminal record and the suspiciously fortuitous circumstances of the size and timeliness of the insurance policy.

Dubinsky J. was convinced that the claimant had displaced the burden of proof. There was evidence that Cyr was heading for Newfoundland in a damaged boat in bad ice conditions and in a storm; a very thorough police search for Cyr had failed to turn up any evidence of his survival; despite his past criminal record, Cyr had no reason to disappear; most persuasive of all, three other men, none of whom had any reason to disappear, accompanied Cyr in the boat and remained missing.

Stanfield happens to have been a case in which the insurance beneficiary could marshal numerous facts and circumstances to counterbalance the suspicions raised by the insurer. Many times there will be less evidence available and the beneficiary will be hard pressed to present such facts as will not "leave the scales in equilibrium".

It was noted in *Stanfield* that the action was brought under section 168 of the Insurance Act, but neither that provision nor section 169 was discussed. Where a life insured has been missing for seven years, section 169 authorizes an application, *by either the insurer or the claimant*, to the Court for a presumption of death declaration. In other circumstances, not involving absence for seven years, where the only question in issue is the death of the life insured, section 168 authorizes an application *by either the insurer or the claimant*.

29. (1977), 17 N.S.R. (2d) 1, *aff'd* (1977), 17 N.S.R. (2d) 115 (S.C., A.D.)

A review of the law reports will not suggest any activity by the insurance companies so far as exercising their authority to apply for a declaration is concerned. Given the obvious financial advantage which follows from retention of the insurance proceeds, perhaps it is unreasonable to expect insurance companies to enthusiastically embrace an opportunity to apply to pay them out.

However, consider the situation which arises when the life insured disappears leaving, let us assume, a wife and perhaps children, often in rather impoverished circumstances. If the putative widow seeks the insurance proceeds she finds that she will have to establish her husband's death. If seven years have not elapsed, or if her husband had good reason to disappear, her prospect is an expensive legal proceeding with little expectation of obtaining the required declaration.

Given the importance of life insurance to a man's survivors, an importance which the industry itself finds useful to emphasize, surely the Insurance Act should require the insurer to apply under section 168 or section 169, as appropriate, for the declaration enabling it safely to pay the proceeds to the beneficiary. Even this change in the Act, which would at least assist those potential claimants who are deterred by the cost and the hazards of litigation, seems too modest. The economic advantage of holding the money until death is proven is not a persuasive argument in favour of the insurer. At present, the persuasive case for the insurer is that it cannot safely pay out the insurance proceeds, without a court order, lest the missing life insured should appear asking for the surrender value of his policy. I suggest that the Insurance Act should be amended to provide that, whenever it is established that the life insured has disappeared for a period exceeding one year, the insurer shall pay the insurance proceeds to the beneficiary. If the life insured later appeared he would have no property rights and no claim under the former policy. If subjected to appropriate safeguards to control fraudulent disappearances and claims, this change would greatly assist a small number of people who desperately need assistance without significantly affecting the underwriting risk of life insurers.

5. Statutory Conditions

A recent judgment of Hallett J., *MacLean v. The Dominion Insurance Corporation*,³⁰ involves several issues and concludes

30. (1977), N.S. unreported, S.P.H. No 00096

with several holdings. It is of greatest interest as the most recent test of a fire insurer's liberty to use a vacancy clause in the face of a challenge to such clauses as being an impermissible variation of the statutory conditions.

To fully appreciate the issue it is necessary to recall that until 1956 fire insurance policies were subject to the following statutory condition:

5. RISKS NOT COVERED EXCEPT BY SPECIAL PERMISSION — Unless permission is given by the policy or indorsed thereon, the insurer shall not be liable for loss or damage occurring:

. . . .

(d) VACANCY — when the building insured or containing the property insured is, to the knowledge of the insured, vacant or unoccupied for more than thirty consecutive days³¹

At the same time, fire policies contained a further statutory condition, identical to present Statutory Condition #4, avoiding the policy for any material change in the risk not notified to the insurer.

In 1956 the common law provinces enacted a new uniform fire insurance code simplifying and reducing the number of statutory conditions.³² Old Statutory Condition #5(d) regulating vacancy was deleted. This left alternative inferences concerning the insurer's liberty to control vacancy. Whereas formerly a vacancy clause would clearly have covered the same ground as Statutory Condition #5(d) and would have been struck down as a "variation, omission or addition" to the statutory conditions, it was now arguable that vacancy was a matter to be controlled by the contract and the insurer could insert its own vacancy clause, perhaps more onerous than the old 30 day clause.

The alternative argument was that vacancy should be treated as but one of many possible material changes in the risk to be governed by the new Statutory Condition #4 whose role would now be much expanded.

These two arguments prevailed, in turn, in the Newfoundland courts in *Simon v. London & Scottish Assurance Corporation Ltd.* in which a house stood vacant for about six months before loss. The insurer relied on an exclusion in respect of vacancy for more than 30

31. Statutory Condition #5(d) taken from the Schedule to the Fire Insurance Policy Act, R.S.N.S. 1954, c.100

32. See, S.N.S. 1956, c.6

consecutive days, and also argued that there had been an unreported material change in the risk.

At trial³³ Mifflin J. held that it had not been proven that the vacancy materially affected the risk. He also denied the defence based on the exclusion clause on the ground that the attempted exclusion was an impermissible variation of the statutory condition governing material changes in the risk.

The Court of Appeal reversed on both grounds.³⁴ It held that the vacancy clause could stand along with Statutory Condition #4 and was not a prohibited attempt to vary that statutory condition. Puddester J., Higgins J. concurring, also held that in the circumstances of the case, there had been a material change in the risk.

The facts in *MacLean v. The Dominion Insurance Corporation* were very similar to *Simon*, and the result is consistent.

The insurance policy contained an exclusion in respect of,

. . . .

(c) loss or damage caused while the building is to the knowledge of the insured vacant for more than thirty (30) consecutive days;

. . . .

The building stood vacant from March until its destruction in December. During this time it was broken into several times. The insurance policy was renewed in September without any mention to the insurer of the vacancy or the break-ins.

Hallett J. upheld the defence based on exclusion clause (c) which, he held, was not offensive to s.121 of the Act as a “variation or omission of or addition to any statutory condition”. The exclusion clause, he said “. . . merely limits the risk which does not in any way relate to the matters covered by the statutory conditions”.

He also held that the conduct described amounted to an unreported material change in the risk so that the insurer had a defence under Statutory Condition #4.

This is undoubtedly an area of insurance law of great difficulty and delicate distinctions. There appear to co-exist as separate, but nearly indistinguishable concepts, conditions (both statutory and consensual), exclusions, and restrictive definitions of the risk.

33. (1966), 56 D.L.R. (2d) 180 (Nfld. S.C.)

34. [1969] I.L.R. 1-267 (Nfld. C.A.)

In such an area it is perhaps somewhat graceless to quibble, but one cannot resist noting the apparent logical incongruities in the judgments of Puddester J. and Hallet J. How can it be said that an exclusion clause is unrelated to the statutory conditions, and in the next breath, that the conduct which offended the exclusion clause also represented a breach of one of the statutory conditions?

If these were alternative holdings I would not cavil, but in both cases they are presented, not in the alternative, but as holdings which stand together.

Two other propositions from *MacLean* deserve mention. Relying on remarks made in *Simon* by Puddester J. who, in turn, obtained support from *Nahayowski v. Pearl Assurance Company Limited*,³⁵ Hallett J. asserted that the court may draw an inference of a material change in the risk, by reason of vacancy of a building in a remote area, without requiring the insurer to give expert evidence on the question what does amount to a material change in the risk. In view of the several break-ins this inference was amply justified on the evidence presented to Hallett J. Fortunately, he made it plain that he was drawing his inference from the evidence and was not establishing a general proposition that vacancy, even in a remote area, is presumed to be a material change in the risk unless the insured refutes the presumption.

Hallett J. also held that by renewing his policy in September without mentioning the vacancy or the break-ins, the insured was in breach of his disclosure duty under Statutory Condition #1. This, he said, was “*an omission to communicate a circumstance that is material to be made known to the insurer . . .*”³⁶

It is noticeable that although he characterized the insured's default as a non-disclosure rather than a misrepresentation, his Lordship avoided using the word “fraud”. Statutory Condition #1 speaks of any person who “. . . misrepresents or fraudulently omits to communicate any circumstance which is material . . .”³⁷ and *Taylor v. The London Assurance Corporation*³⁸ confirms that fraud must be shown in order to avoid a fire insurance policy on the basis of non-disclosure. Presumably, Hallett J. found fraud but did not say “fraud”.

35. (1964), 45 W.W.R. 662 (Alta. S.C., T.D.)

36. Emphasis added by Hallett J.

37. See, Statutory Condition #1 in the Schedule to Part VII of the Act

38. [1935] S.C.R. 422; [1935] 3 D.L.R. 129; 2 I.L.R. 252

6. Subrogation

Like insurable interest, subrogation is a basic insurance principle with a high capacity to generate litigation and a large tendency for abuse. The most serious abuses of the concept have come through legislative tinkering rather than through the judicial process.

In respect of automobile insurance and fire insurance policies, section 100M and section 128, respectively, of the Insurance Act have eroded some of the primary characteristics that made subrogation such a finely-balanced equitable tool for adjusting the respective rights and obligations of insurer, insured and third party obligee.

Although s.100M wrought some other changes in the subrogation rights under an automobile insurance policy, the simplest, and most serious, change it shares with section 128; both sections breach the fundamental notion that the insured is to be fully indemnified as a first priority and only after that has been achieved does subrogation operate to throw the benefit of any excess recovery on the insurer.

Both section 100M(2) and section 128(2) alter this fundamental notion expressly and indisputably. However, the legislatures began to proliferate statutory subrogation mutations whose characteristics were not entirely plain. They were clearly not the common law (or rather, equitable) breed, but the extent of their deviation from the common law model was in some respects debatable.

Thus, the most significant, and most salutary, judgment in this area in recent years was the Supreme Court of Canada judgment in *Ledingham v. Ontario Hospital Services Commission*³⁹ which reaffirmed a full indemnity for the insured as a first priority and a basic assumption in all subrogation situations except where expressly varied by statute. That case involved competing claims, against an inadequate Motor Vehicle Accident Claims Fund, by the injury victims and by the Ontario Hospital Services Commission. The argument for the Commission was that its statute-based subrogation right allowed it to participate *pro rata* with the injury victim in any third party recovery. This was not plainly stated in the Hospital Services Commission Act, but was an inference based on other features of the statutory subrogation creature. In affirming that full indemnity for the insured is a basic assumption of all subrogation provisions, statutory or otherwise, the Supreme Court of Canada confirmed the position taken by Cowan C.J.T.D. when

39. [1975] 1 S.C.R. 332; 46 D.L.R. (3d) 699

the same question arose under the Nova Scotia Hospital Insurance Act in *MacDonald v. Parrish*.⁴⁰ Fortunately, the new Health Services and Insurance Act⁴¹ attempts, in section 13(9), to give a solid statutory endorsement to this important safeguard for the insured. Unfortunately, section 13(9) is somewhat infelicitously phrased and, in the result, does not confirm the insured's prior claim to a full indemnity as clearly as one would like.⁴²

The subrogation problem becomes particularly acute when the third party who has caused the loss stands in some close relationship to the insured and claims to be an insured under the same policy. The Supreme Court of Canada has recently dealt with three cases of this nature, *Agnew-Surpass Shoe Stores Ltd. v. Cummer-Yonge Investments Ltd.*,⁴³ *Ross Southward Tire Ltd. v. Pyrotech Products Ltd.*,⁴⁴ and *Commonwealth Construction Co. Ltd. v. Imperial Oil Ltd.*⁴⁵

The Agnew-Surpass company was the tenant of premises on a shopping plaza. Its lease contained three notable features. The tenant agreed to make repairs except for reasonable wear and tear and except for damage caused by perils against which the lessor was obligated to insure. The standard form language obliging the tenant to insure was deleted in pencil. Thirdly, the lessor covenanted to insure against "all risk of loss or damage caused by or resulting from fire".

The lessor obtained a policy of fire insurance which covered loss of business rentals as well as damage to the building.

Through the tenant's negligence, a fire started in its premises and spread to other stores in the plaza. The insurer paid \$208,000 for damage to the building and \$25,000 for lost rentals, and claimed to recover the full \$233,000 from Agnew-Surpass by way of subrogation. Agnew-Surpass argued that it had been exonerated by the lease from all liability. The Supreme Court of Canada split three ways. Two judges considered that the lease did not exonerate the tenant who, accordingly, got no benefit of the insurance policy.

40. (1972), 24 D.L.R. (3d) 467 (N.S.S.C., T.D.)

41. S.N.S. 1973, c. 8

42. See the discussion in J. Rendall, *Subrogation in Medical and Hospital Insurance Schemes: Judicial Philosophy Versus Legislative Pragmatism* (1974), 6 Ottawa L.R. 291 at 320-22

43. [1976] 2 S.C.R. 221; 55 D.L.R. (3d) 676; [1975] I.L.R. 1-675

44. [1976] 2 S.C.R. 35; 57 D.L.R. (3d) 248; [1975] I.L.R. 1-691

45. (1976), 69 D.L.R. (3d) 558; [1976] I.L.R. 1-804 (S.C.C.)

Three judges found that the lease fully exonerated the tenant who, therefore, obtained the full benefit of the insurance. Four judges held that the lease exonerated the tenant in respect of the damage to the building but not in respect of the lost rentals. In the result, the insurer was able to recover from Agnew-Surpass the \$25,000 paid for lost rentals.

In the *Pyrotech* case, Pyrotech Products was tenant under a lease which did not specifically oblige the landlord to insure but which did impose on the tenant the cost of property taxes, power and water rates, and insurance rates. The landlord insured with Aetna Insurance Company, the policy apparently making no mention of Pyrotech. The latter company was unaware of the nature of the policy taken out by the landlord, but paid over, as requested, that part of the insurance cost referable to the fire cover. Pyrotech had its own policy of insurance with the Maryland Casualty Company covering Pyrotech's liability as a tenant. This policy had been taken out by Pyrotech when the company occupied different premises and was transferred by the insurer to relate to the new premises "as a matter of course".

The landlord's building was destroyed by a fire caused by Pyrotech's negligence. Aetna paid for the loss and claimed to be subrogated. It will be seen that the dispute was really between the two insurers.

By a 3-2 majority the Supreme Court of Canada held that, though the lease did not expressly exonerate the tenant from liability for its negligence, the agreement to pay for fire insurance protection gave it the benefit of the fire insurance cover in Aetna's policy. Although the tenant might remain liable for loss caused in other ways, it should have the benefit of the insurance for which it had paid.

In the third case Imperial Oil was constructing a fertilizer plant. The head contractor was Wellman-Lord (Alberta) Ltd. and Commonwealth Construction was a subcontractor to install piping. Imperial Oil obtained a multi-peril subscription policy in which the insured was named as follows:

"IMPERIAL OIL LIMITED AND ITS SUBSIDIARY COMPANIES AND ANY SUBSIDIARIES THEREOF AND ANY OF THEIR CONTRACTORS AND SUBCONTRACTORS".

A fire, caused by Commonwealth did \$305 worth of damage to property of Commonwealth and \$103,000 damage to the rest of the project. The entire loss was paid and a subrogation claim made against Commonwealth for all but the \$305. The insurers,

obviously, were arguing that Commonwealth had an interest limited to its own property.

The interrelation of insurable interest and subrogation is nicely illustrated in this case. For the Court, de Grandpré J. separated the case into two issues. First, in addition to its obvious interest in its own work, did Commonwealth have an insurable interest in the entire project so that subrogation was ruled out by basic principles? Secondly, if not, was subrogation nevertheless ruled out by the wording of the policy and the contractual arrangements between Imperial Oil, Wellman-Lord and Commonwealth?

De Grandpré J. answered both questions in favour of Commonwealth. He noted particularly that the commercial function of such insurance, known as a "Builders' risk policy", was to guarantee funds to rebuild in the event of loss without complex questions of liability which might necessitate long litigation when so many parties were participating in a major project.

A county court case in Ontario, *Liberty Mutual Insurance Co. v. Partridge*,⁴⁶ looks at first innocuous enough, but may prove to be a very disturbing development.

Diane Partridge owned and insured an automobile which, with her consent, her husband regularly drove. The automobile was destroyed in a collision which resulted in a conviction of Mr. Partridge under section 234 of the Criminal Code.

Section C of the policy contained an exclusion directed at just such an eventuality, and Waisberg Co. Ct. J. noted that it would have made more sense to bring action against Mrs. Partridge for return of the money paid for the collision loss. To this one might add that the simplest recourse of all for the insurer would seem to be to refuse to pay for the collision loss.

In any event, Liberty Mutual paid Diane Partridge nearly \$3,200 and claimed to be subrogated in this amount against her husband. Waisberg Co. Ct. J. gave judgment for the insurer on the ground that it was entitled to be subrogated against the person who caused the loss.

Given that Mrs. Partridge could have been deprived of her recovery by the exclusion clause, the result in the particular case is not disturbing. However, the implications for other situations are chilling. Judge Waisberg did not rest his judgment on the misconduct of Mr. Partridge amounting to a breach of the policy. It

46. (1976), 12 O.R. (2d) 16; 67 D.L.R. (3d) 603; [1976] 1 L.R. 1-806 (Co. Ct.)

will be very upsetting if this case presages a move by insurers to claim subrogation in respect of collision loss against spouses, children and sundry other drivers contemplated by both insured and insurer at the time the policy is written. This would, in the majority of cases, effectively deprive the insured of the very collision insurance for which he has contracted and paid.

*Lawton v. Dartmouth Moving & Storage Ltd.*⁴⁷ is a Nova Scotia case which involves a discussion of subrogation only collaterally. Dubinsky J. held that a storage company was not liable for loss caused to customers' furniture caused by a fire in the storage company's premises. He then went on to note that the actions before him were subrogation claims by the insurers of the owners of the furniture, and that the settlement of the insurance claim seemed to leave the owners with less than a full indemnity. Citing his own review of section 100M(1) in *Sheridan v. Tynes*,⁴⁸ Dubinsky J. gave the opinion that the subrogation right conferred on a fire insurer by section 128(1) of the Insurance Act, while in some respects different from the subrogation right at common law, was like the common law right in that it did not arise until the insured was fully indemnified.

Dubinsky J. is really dealing here with the competing claims of insurer and insured to control the action against the third party. This was the point which gave rise to several cases and led ultimately to the addition of subsections (3), (4), (5) and (6) to section 100M in order to provide a legislative code in respect of automobile insurance.

III. *Automobile Insurance Cases*

Several of the most interesting and most significant Nova Scotia cases have involved automobile insurance. *Canadian General Insurance Co. v. MacKinnon* and *Wolfe v. Oliver*, for example, are of national importance.

1. *Consent to Drive*

In view of the importance of section 82(1) of the Insurance Act in the general statutory scheme intended, so far as possible, to guarantee an insurance recovery for the innocent victim of an

47. (1976) 64 D.L.R. (3d) 326 (N.S.S.C., T.D.)

48. (1971), 4 N.S.R. (2d) 143; 19 D.L.R. (3d) 277; [1971] I.L.R. 1-441 (S.C., T.D.)

automobile accident, it is no wonder that "consent to drive" has become one of the most recurrent issues in insurance litigation.

82(1) Every contract evidenced by an owner's policy insures the person named therein and every other person who with his consent personally drives an automobile owned by the insured named in the contract and within the description or definition thereof in the contract against liability imposed by law upon the insured named in the contract or that other person for loss or damage,

(a) arising from the ownership, use or operation of any such automobile; and

(b) resulting from bodily injury to or the death of any person, and damage to property

Leaving aside theft of the insured car altogether, the variety of situations which can give rise to questions of "consent to drive" appears to be endless.

Some of the situations are common and can be disposed of briefly. In *Bosch v. Soares and Hatfield*⁴⁹ the insured's daughter, Kathleen Soares, was driving her father's car with his consent. During the evening she allowed her friend, Harold Hatfield, to drive and he was involved in an accident.

The insured, Albert Soares, had never met Hatfield, and the question of consent became a question of implied derivative consent flowing in two stages from father to daughter and then to someone he had never met. Mr. Soares' testimony as to the general restrictions placed by him on his daughter's liberty to use the car was rather vague, but Dubinsky J. held that, though Hatfield may have thought he had proper consent to drive, Mr. Soares' consent could not be implied without some evidence that he had at least considered the question.

In *Bennet v. Grant*⁵⁰ the insured, Susan Grant, had followed an established practice of allowing Philip Hersey to drive her car. Miss Grant asserted that she had restricted Hersey in his use of the car on the day of the accident. However, Cowan C.J.T.D. found this evidence too weak in the face of the established pattern and held that Hersey was driving with Miss Grant's consent at the time of the accident.

*Judgment Recovery (N.S.) Limited v. London and Edinburgh Insurance Company*⁵¹ involves a fact situation in which the Court

49. (1974), 7 N.S.R. (2d) 531 (S.C., T.D.)

50. (1976), 22 N.S.R. (2d) 156 (S.C., T.D.)

51. (1975), 11 N.S.R. (2d) 602; [1976] I.L.R. 1-724 (S.C., A.D.)

refused to imply consent even though there was some evidence to support such an implication. Elmer Richardt was hired in Medicine Hat as a spare driver for a tractor used by the owner, Irwin Neil, to haul trailers of frozen foods. Their assignments took Neil and Richardt to Toronto, Fort Erie, Dartmouth and ultimately Lunenburg. Throughout the trip Richardt drove only with Neil present.

In Lunenburg the two men spent an evening drinking and then Neil departed with a girl leaving Richardt and another man in the tractor with the key in the ignition. An accident occurred when Richardt and his friend essayed a trip to Bridgewater to find an open restaurant.

At trial, Richardt admitted that he had no express consent to use the tractor on the night of the accident. The trial judge refused to imply such consent and the Court of Appeal dismissed the appeal.

Two months after this Court of Appeal judgment Cowan C.J. heard a somewhat similar case involving common employment as taxi drivers. *Smith v. Gilbert*⁵² must stand as convincing authority of the primary importance of a clear direction from the insured restricting use of the vehicle whenever a question of "consent to drive" arises.

The insured, Ruth Wilson, operated a taxi business. James Gilbert drove one of her cars with roof light 749, and Ronald Shaw drove another with roof light 566. A number of persons gave evidence of instructions from Miss Wilson that no one was to drive a vehicle except the driver with whom an arrangement for the specific car had been made.

Shaw and Gilbert drove in car 566 to a lounge. An argument with the management of the lounge led to a scuffle in which Shaw was injured and taken into custody by the police. Shortly thereafter the plaintiff was injured in a collision with car 566 while it was being driven by Gilbert. According to Shaw, Gilbert had not requested the keys; the inference was that they had fallen out of Shaw's pants pocket at some stage.

In the course of a holding that Miss Wilson's insurer was not obliged to respond to the plaintiff's claim, Cowan C.J. said,

It is probable that, by reason of the arrangement between Miss Wilson and the drivers of the respective vehicles, she would be responsible if one of them was involved in an accident, and was

52. (1975), N.S. unreported, S.H. 04266

negligent in the course of his driving as a taxi driver. It is apparent that, at the time in question, Gilbert was not so driving, and that he was on a frolic of his own. He was not driving in the course of his employment, or as a servant or agent of Ruth Wilson, and therefore, she is not liable to the plaintiff.⁵³

Immediately preceding this part of his judgment the Chief Justice emphasized that neither Miss Wilson, nor anyone with her authority, had given Gilbert consent to drive car 566. Gilbert was supposed to drive only car 749.

In the result, it is a little difficult to be sure whether Miss Wilson and her insurer were exonerated because Gilbert was driving the wrong taxi, or because he was driving it for his own purposes and not in pursuit of her taxi business, or whether each reason might suffice, by itself, to foreclose the plaintiff's action against Miss Wilson and her insurer.

Earlier on the same evening Gilbert was slightly injured in an accident with car 749 and was taken to Victoria General Hospital. If he had been driven to hospital in car 749 by another of Miss Wilson's drivers would the taxi have been off cover during that time and for which of the two reasons above? In fact, Gilbert left his wallet at the hospital and was taken back to retrieve it by Shaw in car 566; if Shaw had at that stage been involved in an accident would the insurer have escaped on the ground that Shaw was not driving in the course of his employment?

This case raises a number of concerns about taxi operations. Granting that Miss Wilson may have selected her drivers by reason of superior driving records (Gilbert's two accidents in one night notwithstanding), it makes excellent sense for her to prohibit loans of the cars to friends, family members and sundry other borrowers. However, should she and her insurer be able to shelter behind such a restriction on use if one of her cars is driven, for taxi purposes, by a driver of another vehicle selected for employment, no doubt, by reason of an equally impressive driving record?

Given that taxi driving almost inevitably involves opportunity and incentive to combine work and play, or at any rate the likelihood that personal errands will frequently insinuate themselves between assignments, to what extent should Miss Wilson and her insurer be able to resist a claim arising from an accident which occurs while the driver is "on duty" but in fact temporarily using the car for a private purpose of his own?

53. *Id.* at 4

Cowan C. J. ventured no comment on the result which would follow if Shaw had caused an accident with car 566 while on his way to or from the lounge with Gilbert. His Lordship emphasized the fact that Gilbert was not driving in the course of his employment. The same would have to be said of Shaw in the case I. have hypothesized. Although there is nothing in the judgment to indicate that Miss Wilson knew that her drivers used the taxis for their own transportation to places of entertainment, there is equally no indication of any instruction by her on the point, and no indication that a trip to a Dartmouth lounge was at all remarkable.

A different commercial setting in which a problem of implied derivative consent to drive can readily arise is illustrated by *Sulyok v. Carroll*.⁵⁴ A group of six visitors to Halifax wished to do some touring. One, Robert Taylor, rented a car from Holiday Rent-a-Car Ltd. The rental agreement provided that the Renter (Holiday) would provide an automobile liability insurance policy for the benefit of the Renter (Taylor) "and others driving with Renter's and Renter's prior consent". The agreement also stipulated that the vehicle was not to be used or operated "unless otherwise provided on the face hereof, by any person other than the Renter".

On the face of the agreement appeared the particulars pertaining to Taylor. A space for "alternate driver(s)" was blank. Holiday's employee had not raised the question and, in any event, Taylor expected to be the only driver although all six members of the group were sharing the cost.

Taylor allowed another member of the group, Christine Carroll to drive, and while she was driving there was an accident in which the car was badly damaged and two other members of the group were injured. Cowan C.J.T.D. held that Holiday's insurer, Lloyds of London, must respond to the claim against Taylor by the two injured passengers, but were not obliged to respond to the claims against Miss Carroll.

He was urged to adopt the reasoning of two U.S. cases in which it was said that car rental agencies and their liability insurers should know that there is a high probability of the rental cars being driven by persons not named and not authorized in advance, and that in the public interest the car rental agency should be taken to have given constructive consent to driving by such unauthorized drivers. Cowan C.J. did not consider the reasoning in the two cases

54. (1977), 22 N.S.R. (2d) 126 (S.C., T.D.)

applicable to Nova Scotia. He cited the Motor Vehicle Act, s.55, which makes the owner of a rental vehicle jointly and severally liable with the renter for damage caused by the renter or for damage caused by anyone else permitted to drive the vehicle "with the express or implied permission of the owner". In the case before him there was no express permission from Holiday for Christine Carroll to drive, and Cowan C.J. considered that there was no implied permission.

Easily the most distressing of all the "consent to drive" cases is *Wolfe v. Oliver*,⁵⁵ a classic example of the notorious practice by which young persons buy automobiles and cause them to be registered and insured by a parent, and a dramatic illustration of the inadequacy of our elaborate statutory scheme to protect traffic victims.

David Oliver owned a 1970 Austin which he insured with the Co-operative Fire and Casualty Company. Having been convicted of impaired driving and lost his licence for 12 months, David arranged for his parents to take over the installment payments on the Austin. Although no change was made in the registration under the Motor Vehicle Act, and no change was made in David's policy with Co-op, the Austin was thereafter treated as belonging to David's mother, Cleophas Oliver, and was not driven by David or the other Oliver children.

Cleophas Oliver had her own policy with Co-operative Fire and Casualty Company, originally issued in 1967 to cover a Toyota.

In 1972 David's licence was restored and he arranged to buy a 1967 Ford, the purchase financed by Canadian Acceptance Corporation. In order to obtain a much lower premium, David arranged for his mother to register the Ford in her name, and she caused the Ford to be added by endorsement to her policy with Co-op. Mrs. Oliver and David both signed the chattel mortgage taken by Canadian Acceptance.

The Ford was regarded by all members of the family as belonging to David and was driven only once by Mrs. Oliver and once by her husband.

David Oliver, driving the Ford, collided with David Wolfe and inflicted \$10,000 of damage on him. Wolfe sued both David Oliver and his mother. Cowan C.J. found that Cleophas Oliver was an

55. (1974), 8 N.S.R. (2d) 313; 46 D.L.R. (3d) 380; [1975] I.L.R. 1-644, *rev'g* (1973), 8 N.S.R. (2d) 338; 34 D.L.R. (3d) 669; [1973] I.L.R. 1-555 (S.C., A.D.)

“owner” of the Ford within section 221 of the Motor Vehicle Act,⁵⁶ but that she was not liable to Wolfe inasmuch as David Oliver was not operating the car as her servant or agent. He had her consent to use the car, indeed it was agreed that he should have sole control and use of it, but he did not use it as her agent or servant and the presumption raised by subsections (3) and (4) of section 221 of the Motor Vehicle Act had been rebutted. Thus, Cowan C.J. gave judgment for Wolfe against David Oliver but not against Cleophas Oliver.

The next issue, of course, was whether David Oliver’s liability to Wolfe was covered, either under his own policy or under his mother’s policy with Co-op.

The insurer argued that the Ford was not insured under Mrs. Oliver’s policy, notwithstanding the endorsement purporting to add it to the policy. The argument was that she was not the owner and had no insurable interest to support a policy on the Ford. Cowan C.J. reiterated his conclusion that Cleophas Oliver was the “owner” of the Ford for the purposes of section 221 of the Motor Vehicle Act. This obviously exposed her to potential liability in respect of the use of the car, and, in His Lordship’s view, gave her an insurable interest. Moreover, having made herself responsible for payment on the chattel mortgage, she had an interest in the preservation of the Ford which represented the security for the loan.

The insurer’s second argument was that David Oliver was not insured by his mother’s policy in that he was not a named insured, nor was he within the extended cover provided by section 82(1) inasmuch as he was not driving with his mother’s consent. Rather, he drove the Ford as of right as owner of it.

Cowan C.J. rejected this argument, interpreting section 82(1) to apply unless the driver has taken the vehicle without the consent of the named insured. Throughout, Mrs. Oliver had consented to the arrangement concerning the Ford. While she might have been unable to prevent David from using the Ford if she had wished, she could have deleted the car from her insurance policy. In this sense, she consented to his driving.

Cowan C.J. also held that David’s liability was covered under his own policy with Co-op which had been continued in force during his licence suspension and was still in force at the time of the accident.

56. R.S.N.S. 1967, c.191

The insurer contended that the Ford was not covered under that policy which described the insured vehicle in the following standard form language:

AUTOMOBILE DEFINED

In this Policy except where stated to the contrary the words "the automobile" mean:

. . .

(a) The Described Automobile — an automobile, trailer or semi-trailer specifically described in the Policy or within the description of insured automobiles set forth therein;

(b) A Newly Acquired Automobile — an automobile, ownership of which is acquired by the Insured and, within fourteen days of its delivery to him, notified to the Insurer in respect of which the Insured has no other valid insurance, if either it replaces an automobile described in the application or the Insurer insures (in respect of the section or subsection of the Insuring Agreements under which claim is made) all automobiles owned by the Insured at such delivery date and in respect of which the Insured pays any additional premium required; provided however, that insurance hereunder shall not apply if the insured is engaged in the business of selling automobiles;

. . .

(c) A Temporary Substitute Automobile — an automobile not owned by the Insured, nor by any person or persons residing in the same dwelling premises as the Insured, while temporarily used as the substitute for the described automobile which is not in use by any person insured by this Policy, because of its breakdown, repair, servicing, loss, destruction or sale;

. . .

(d) Any Automobile of the Private Passenger or Station Wagon type, other than the described automobile, while personally driven by the Insured, or by his or her spouse if residing in the same dwelling premises as the Insured, provided that

. . .

(iv) such other automobile is not owned or frequently used by the Insured or by any person or persons residing in the same dwelling premises as the Insured;

. . .

(e) [deals with employees and partners]

(f) [deals with a trailer owned by the Insured]

(g) [deals with a trailer not owned by the Insured].

Obviously, the Ford was not the “described automobile” in paragraph (a) since David had not informed the insurer of its acquisition, nor done anything to add it to his policy. As David owned the Ford it was not within paragraph (c) or (d).

However, the Chief Justice held that the Ford was a “newly-acquired automobile” within paragraph (b) in that it replaced the 1970 Austin and, though its acquisition had not been notified to the insurer, the accident took place four days after its acquisition, well within the fourteen days prescribed for notification.

In the result, although David Oliver was disentitled to any indemnity by reason of his participation in a misrepresentation made to the insurer, and by reason of having driven while impaired, nevertheless Co-op was obligated, under both policies, to respond to Wolfe’s claim.

This judgment was reversed by the Court of Appeal. Cooper J.A., for the Court, expressed some doubt whether Cleophas Oliver had any insurable interest to support a policy on the Ford, but did not decide that question. He did decide that David Oliver was not covered under her policy. The entire scheme concerning registration and insurance was a sham, David had full control over the car and its use, and Mrs. Oliver’s knowledge of, and acquiescence in, this scheme did not amount to express or implied “consent” within section 82(1).

As to David’s own policy, Cooper J.A. held that it did not cover the Ford which was not within the definition of a “newly acquired automobile” since it did not “replace” the described automobile. David had parted with the Austin 18 months earlier and had owned no car in the interim.

I will not dwell on the relative merits of the approaches to interpretation of statutory and contractual language illustrated by these two judgments in *Wolfe v. Oliver*. I think it might be suggested that Cooper J.A.’s reading of “consent” and of “replaced” is so strict as to be overly legalistic, but I prefer for the moment a cruder analysis of his judgment.

Permitting myself the luxury of assuming a “man-in-the-street” perspective (hopefully, if not on the Clapham omnibus, yet endowed with some of that traveler’s famous common sense), I would summarize the result of *Wolfe v. Oliver* as follows:

(1) we have an elaborate scheme designed to provide insurance protection for traffic victims;

(2) the scheme involves strict liability for the insurer notwithstanding serious misconduct by the insured. For example, misrepresentation of the ownership and primary driver of the Ford, and driving it while impaired afforded Co-op no defence against Wolfe within the \$35,000 minimum limits;

(3) Co-op had insured David Oliver who was accepted by it, thus, as one of its insured persons;

(4) Co-op had also insured the Ford under Mrs. Oliver's policy, thus accepting the Ford as one of its insured vehicles;

(5) the Ford was owned by either David Oliver, or his mother, or both, and was driven by David;

(6) despite our careful statutory plan, and despite what appears at first to be two policies issued by the same insurer covering the Ford, the insurer had no liability to David Wolfe who was struck by a drunken driver and left with some eight major scars on his face which, among many other observations appearing in the medical evidence, left him with an asymmetrical appearance.

The best that can be said of this case is that Wolfe's damages, fixed at a little over \$10,000, were nicely within the limits of the statutory fund. Although Co-op was not liable to pay, Wolfe was not without relief. The rest of us chipped in to help him out.

If all of this sounds more like demagoguery than careful legal reasoning, the answer is that demagoguery seems called for. A major statutory reform is desperately needed. This theme will be developed in Part V.

2. *Insurable Interest*

The sort of situation described in *Wolfe v. Oliver* is capable of endless variations and has, in fact, given rise to several cases in Nova Scotia in recent years. Most of the cases involve both an issue of "insurable interest" and an issue of "consent to drive".

One of the more recent cases was *Somers and Somers v. Brow's Estate*.⁵⁷ Alphonsus Brow owned a 1967 Pontiac which he insured with Co-op. He and his wife, Mary Brow, decided to buy a 1971 Pontiac. Because Mr. Brow had the regular use of a Power Corporation truck, he said to his wife that "you might as well have [the car] in your name". Thus it was arranged that Mrs. Brow sign a conditional sale agreement with the car dealer, and the 1971 Pontiac was registered in her name. The 1967 Pontiac was traded in and

^{57.} (1977), 17 N.S.R. (2d) 121; *sub nom. Co-operative Fire and Casualty Co. v. Judgment Recovery (N.S.) Ltd.*, [1977] I.L.R. 1-861 (S.C., A.D.)

valued at \$1,500 against the price of the new car. Mrs. Brow had a job and made all the payments on the loan, though her job was seasonal and Mr. Brow provided an unascertained amount of the money required to maintain the payments. The 1971 Pontiac was covered under Mr. Brow's insurance policy by endorsement substituting it for the 1967 Pontiac.

Mrs. Brow, driving the 1971 Pontiac, inflicted injury on Carin and Frank Somers.

Co-op, an old hand at this game, argued that it was not obliged to answer the claim inasmuch as Alphonsus Brow, its insured, was not the "owner" and Mrs. Brow was not driving the car with his consent. The issue of insurable interest did not really surface here as it did in *Wolfe v. Oliver* and in several other cases, counsel for Co-op apparently preferring to stay as close as possible to the winning formula in the Court of Appeal in *Wolfe v. Oliver*.

Dubinsky J. distinguished *Wolfe v. Oliver* on the basis that Alphonsus Brow made significant financial contributions to the purchase of the car. His Lordship concluded that registration of the car in Mrs. Brow's name was a matter of convenience, that Alphonsus Brow was its beneficial owner, and that Mary Brow drove with his consent. He therefore ordered Co-op to respond to the claim.

The Court of Appeal, again speaking through Cooper J.A., accepted Dubinsky J.'s view that *Wolfe v. Oliver* could be distinguished on the facts, and dismissed an appeal.

3. *Minimum Limits*

The central features of the Insurance Act provisions designed to guarantee an insurance sum available to motor vehicle accident victims, are the statutory minimum limits on liability insurance policies, the judgment creditor's direct right of action, and the strict liability provisions, all as set out in section 92 and section 98 as follows:

92 (1) Every contract evidenced by a motor vehicle liability policy insures, in respect of any one accident, to the limit of at least \$35,000, exclusive of interest and costs, against liability resulting from bodily injury to, or the death of, one or more persons and loss of, or damage to, property.

. . . .

98 (1) Any person who has a claim against an insured, for which indemnity is provided by a contract evidenced by a motor

vehicle liability policy, notwithstanding that that person is not a party to the contract, may, upon recovering a judgment therefor in any province or territory of Canada against the insured, have the insurance money payable under the contract applied in or towards satisfaction of his judgment and of any other judgments or claims against the insured covered by the contract and may, on behalf of himself and all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied.

. . . .

(4) The right of a person who is entitled under subsection (1) to have insurance money applied upon his judgment or claim is not prejudiced by

(a) an assignment, waiver, surrender, cancellation, or discharge of the contract, or of any interest therein or of the proceeds thereof, made by the insurer [sic; the word should obviously be "insured"] after the happening of the event giving rise to a claim under the contract; or

(b) any act or default of the insured before or after that event in contravention of this Part or of the terms of the contract; or

(c) any contravention of the Criminal Code (Canada) or statute of any province or territory of Canada, or of any state or the District of Columbia of the United States of America by the owner or driver of the automobile;

and nothing mentioned in clauses (a), (b) and (c) is available to the insurer as a defence in an action brought under subsection (1).

(5) It is not a defence to an action under this Section that an instrument issued as a motor vehicle liability policy by a person engaged in the business of an insurer, and alleged by a party to the action to be such a policy, is not a motor vehicle liability policy, and this Section applies, *mutatis mutandis*, to the instrument.

. . . .

(11) Where one or more contracts provide for coverage in excess of the limited mentioned in Section 92, then, except as provided in subsection (12), the insurer may,

(a) with respect to the coverage in excess of those limits; and

(b) as against a claimant,

avail itself of any defence that it is entitled to set up against the insured, notwithstanding subsection (4).

If there is no insurer responsible to answer the victim's claim,

then of course the victim has recourse to Judgment Recovery up to a limit of \$35,000.

The most important Canadian case on section 98(11) is *Canadian General Insurance Co. v. MacKinnon* which was first decided by Dubinsky J. four years ago and worked its way through the Supreme Court of Canada two years ago.

Donald and Ellen MacKinnon were injured in a collision with a car owned by David Coldwell and driven by Clifford Smith. Coldwell's car was insured by Co-operative Fire and Casualty Company. Smith had a policy with Canadian General Insurance Co. Each policy was written for the statutory minimum limits, \$35,000. At the time of the accident both Smith and Coldwell (who was a passenger in his own car) were in breach of the statutory policy condition against impaired driving.

The total damages awarded the MacKinnons, against Smith and Coldwell jointly and severally, was \$63,000. Apart from the defence of breach of policy condition, the total insurance available, \$70,000, would just nicely satisfy the judgment.

Section 100L of the Insurance Act constitutes an owner's policy a first loss insurance and any other cover excess insurance only. Accordingly, as first loss insurer, Co-op paid the limits of its policy. The balance of the claim, \$35,000 (\$28,000 for the MacKinnons and \$7,000 for the Nova Scotia Health Services and Insurance Commission as a subrogated claim for hospital and medical services rendered to the MacKinnons), was sought from Canadian General.

It was argued for that company most forcefully that section 98(11) allowed it to raise the defence of breach of policy condition. The argument was that the statutory scheme established only one "minimum limits fund" of \$35,000. If there were no insurer, there was a public fund of \$35,000; if there were one insurer with policy limits of \$200,000 it was strictly liable for, and the victim thus was guaranteed, only \$35,000; the result should not be different, the argument proceeded, because of the fortuitous element of two or more insurers being involved.

At trial⁵⁸ Dubinsky J. held against the insurer on two grounds. He did not think the Legislature intended any discrimination, so far as availability of the standard defences was concerned, as between "A" Insurance Company and "B" Insurance Company simply as a result of one being designated the first loss insurer as a result of

58. *MacKinnon v. Canadian General Insurance Co.* (1974), 8 N.S.R. (2d) 541; 43 D.L.R. (3d) 310; [1974] I.L.R. 1-618 (S.C., T.D.)

combining section 100L with a fortuitous set of circumstances concerning who was driving whose car.

Dubinsky J.'s second ground, on which he preferred to rest his judgment attempted to finesse the insurer's argument by resort to very strict statutory interpretation.

His Lordship focused on the following language:

98 (11) Where one or more contracts provide for *coverage in excess of the limits* . . . the insurer may,

(a) with respect to the *coverage in excess of those limits*;

and then noted that neither policy provided for coverage in excess of the limits, as each was written only for the statutory minimum limits. Thus, reading section 98(11) very strictly it did not apply to the case.

Although, in the great Common Law tradition, this judgment would have been sufficient to decide the matter before him, Dubinsky J.'s judgment would have left the law in an unsatisfactory state. His second ground of judgment would have left the implication that Canadian General would be in a better position to resist a claim if its policy were written for \$100,000 than if it were written for only \$35,000.

One can imagine the sudden unpopularity, among insurers, of \$35,000 policies, and we should probably have seen a practice of issuing policies with limits of \$36,000.

The Court of Appeal affirmed,⁵⁹ preferring the first ground of Dubinsky J.'s judgment. Cooper J.A. said that section 100L operated only to establish which policy was first loss insurance, and that the question under section 98(11) was quite distinct. Under that provision, all policies were treated equally and each might be strictly liable up to the \$35,000 limit.

The Supreme Court of Canada dismissed an appeal,⁶⁰ but by the narrowest possible margin, 5-4. The majority adopted the view expressed by Cooper J.A. Excellent dissenting opinions were given by Ritchie J. and Pigeon J.

Ritchie J. accepted the insurer's argument that the entire design of sections 92, 98 and 100L was to create one guaranteed fund, with limits of \$35,000. Pigeon J. reached the same result, but by a

59. *MacKinnon v. Canadian General Insurance Co.* (1974), 8 N.S.R. (2d) 534; 46 D.L.R. (3d) 427; [1974] I.L.R. 1-619 (S.C., A.D.)

60. *Canadian General Insurance Co. v. MacKinnon*, [1976] 2 S.C.R. 606; 13 N.S.R. (2d) 631; 61 D.L.R. (3d) 1; [1976] I.L.R. 1-715

masterful analysis of the statutory language. Noting the plural verb form “provide” in section 98(11) he concluded that it was necessary to consider all policies together when asking the question whether “one or more contracts provide coverage in excess” of \$35,000. He also read section 98(11) and section 100L(1) together and concluded that, since the first loss policy would always cover to a limit of at least \$35,000, any excess cover should be conceded to be “in excess of” the \$35,000 contemplated by section 98(11).

4. *Preservation of Third Party Claims*

Subsections (4) and (5) of section 98 operate very broadly to preserve the direct right of action conferred on a third party judgment creditor, in the face of misconduct by the insured which gives the insurer a defence as against the insured and would also provide a defence to any third party action were it not for the saving effect of these two subsections.

One example of the wide meaning given these provisions is the firmly established line of cases construing section 98(5) to remove the insurer’s defence based on misrepresentation in obtaining the policy, although section 98(5) says nothing clearly about misrepresentation at all.

In *Lane v. Young*⁶¹ Cowan C.J. has recently essayed a similarly wide interpretation of section 98(4) (b). Avery Young owned a 1969 Pontiac covered under a policy issued by The Halifax Insurance Company. He traded the Pontiac on a 1969 Ford, did not notify his insurer of the event, and 20 days later collided with, and injured, Rickey Lane.

The insurer denied liability to Lane on the ground that the Ford was not covered under its policy. As Young and the insurer never contracted concerning the Ford, this defence would be unassailable were it not for the extended definition of “the automobile” in the policy. Paragraph (b) of that definition brings into the meaning of “the automobile” a newly acquired vehicle which replaces the described automobile if its acquisition is notified to the insurer within fourteen days of its acquisition.

Since no notification was given within the prescribed fourteen days, the insurer argued that the Ford was not within the policy definition. Cowan C.J. held that failure to give the notice

61. (1977), 73 D.L.R. (3d) 445; *sub nom. Re Judgment Recovery (N.S.) Ltd. and The Halifax Insurance Company*, 20 N.S.R. (2d) 631 (S.C., T.D.)

constituted an "act or default of the insured" against which section 98(4) (b) was designed to protect the third party claimant.

Quoting Monnin J. in *Pascoe v. Provincial Treasurer of The Province of Manitoba*,⁶² Cowan C.J. concluded that cover had attached "automatically" to the Ford upon its acquisition and had lapsed at the end of the fourteen days. He then relied on a recent Supreme Court of Canada judgment, *General Security Insurance Company of Canada v. Highway Victims Indemnity Fund*,⁶³ which held that the counterpart to section 98(4) in the Quebec Act saved the third party's claim against just such a lapse. However, it is of critical importance that the Quebec provision specifically prevented the insurer from setting up against the third party "the causes of nullity or of lapse that might be set up against the insured". Pigeon J. noted the importance of this difference of language and distinguished *Pascoe* on the ground that the Manitoba Act did not protect the third party against "lapse".

Nova Scotia section 98(4) reads exactly as did the Manitoba counterpart under which *Pascoe* was decided. *General Security* is distinguishable from *Lane v. Young* in exactly the same way that *Pascoe* was distinguishable from *General Security*.

The better view of what happened in *Lane v. Young* would appear to be expressed in this extract from Tritschler J.A. in the Manitoba Court of Appeal judgment in *Pascoe*:

. . . there was no default by the insured and no violation by him of the provisions of the Act or the terms of the policy. If the insured desired to take advantage of the policy's provision for insurance in respect of a "Newly Acquired Vehicle" he was free to do so in the manner prescribed. But he was not under an obligation to do so.

. . . it may be that he did not expect to keep the newly-acquired vehicle for long and so decided that he would not bother to have it insured; or he may have decided to have nothing more to do with this insurer; or he may simply have forgotten. His reasons are unimportant. Whatever they were, he was free to do as he pleased and for any reason which seemed sufficient to him could elect to take advantage or otherwise of the provision under consideration. Just as any other motorist may decide to insure or not to insure or may forget to insure, so also might this insured.⁶⁴

62. (1959), 16 D.L.R. (2d) 300; 26 W.W.R. 640; [1958] I.L.R. 1-305 (Man. Q.B.)

63. [1976] I.L.R. 1-785 (S.C.C.)

64. (1959), 17 D.L.R. (2d) 234 at 238; 27 W.W.R. 393 at 397; [1959] I.L.R. 1-318 at 554 (Man. C.A.)

This treatment by Tritschler J.A. of the problem arising from substitution of vehicles is consistent with our treatment of similar problems concerning freedom to insure and freedom to terminate or forfeit insurance cover. So far as the Insurance Act is concerned, there is no duty on a vehicle owner to insure; having insured, he may terminate at any time immediately upon giving notice to the insurer; he may allow his cover to expire; the insurer, by giving 15 days' notice can terminate the policy and get off the risk. In all of these situations there is nothing to protect the claim of a third party victim. There being no duty on the insured to insure, or to maintain his insurance, it does not seem persuasive to characterize conduct like that of Avery Young as an "act or default . . . in contravention" of the Insurance Act or the insurance contract.

Cowan C.J. was motivated, quite reasonably, by policy considerations. The Halifax Insurance Company was content to insure Avery Young as owner of a 1969 Pontiac. Trading for a 1969 Ford in no way affected the liability risk. When Young injured Lane with his Ford why should the company escape liability for a claim it could not have escaped if Young had inflicted the injury with the Pontiac?

The answer seems to lie in the admittedly refined distinction between breach of policy conditions and restrictive definition of the risk assumed. Although this distinction is narrow, and difficult to articulate entirely satisfactorily, its practical importance is dramatic. The elaborate machinery of section 98, designed to preserve a third party judgment creditor's claim against breaches which would defeat a claim brought by the insured, is subject to the insurer's right to select and define the risk it is willing to underwrite. This is specifically recognized in the following language of section 98(1): "Any person who has a claim against an insured, *for which indemnity is provided* by a contract" ⁶⁵

The argument in *Lane v. Young* is that the insurer agreed to insure a Pontiac; there was no agreement to insure a Ford; apart from the policy's expanded definition of "the automobile" there would be no possible ground for asserting that The Halifax Insurance Company did insure the Ford; the case for saying that the Ford was covered by Young's policy depends on showing total and literal compliance with paragraph (b) of the expanded definition, including notification of its acquisition within fourteen days.

65. Emphasis added.

This argument was rejected by the Court of Appeal which dismissed an appeal from the judgment of Cowan C.J.⁶⁶ MacKeigan C.J.N.S. noted that the Ford was "newly acquired by the insured" and that it "replaced" the Pontiac described in Young's policy. According to the Chief Justice that was sufficient to bring the Ford within the cover. The fourteen day notice requirement did not form part of the description of the vehicle and, therefore, was not part of any restrictive risk definition.

The result of this case seems to be good public policy and the two judgments illustrate creative judicial law-making. However, it further exacerbates the rococo structure of section 98, already so riddled with judicial apertures and so encrusted with judicial embellishments. A complete redrafting of section 98 appears urgently overdue.

IV. *Legislative Developments*

This is a very short Part. There is very little to report.

Apart from enactment of the Health Services and Insurance Act⁶⁷ to streamline the delivery of hospital and medical services, there has been very little legislative activity concerning insurance in the past four years.

Among a number of specific, narrowly-focused, amendments one deserves mention. For many years the automobile insurance legislation in all the common law provinces contained subrogation provisions in the form now found in section 100M (1) and (2),

100M (1) An insurer who makes any payment or assumes liability therefor under a contract is subrogated to all rights of recovery of the insured against any person and may bring action in the name of the insured to enforce those rights.

(2) Where the net amount recovered whether by action or on settlement is, after deduction of the costs of the recovery, not sufficient to provide complete indemnity for the loss or damage suffered, the amount remaining shall be divided between the insurer and the insured in the proportion in which the loss or damage has been borne by them.

A spate of litigation under these provisions concerned the relative claims of insurer and insured to have carriage of the action against the third party. The courts consistently held that, unless fully indemnified by the insurer, the insured retained, as at common law,

66. (1977), 77 D.L.R. (3d) 107(N.S.S.C., A.D.)

67. S.N.S. 1973, c.8

the right to carry the action, control its conduct, and compromise the claim, subject to his duty of due diligence and good faith in favour of the insurer.⁶⁸

The insurance industry was not content with the situation. In the new uniform automobile insurance Part⁶⁹ the following additional subsections were added to section 100M:

100M (3) Where the interest of an insured in any recovery is limited to the amount provided under a clause in the contract to which Section 100A applies, the insurer shall have control of the action.

(4) Where the interest of an insured in any recovery exceeds that referred to in subsection (3) and the insured and the insurer cannot agree as to

(a) the solicitors to be instructed to bring the action in the name of the insured; or

(b) the conduct and carriage of the action or any matters pertaining thereto, or

(c) any offer of settlement or the apportionment thereof whether action has been commenced or not; or

(d) the acceptance of any money paid into court or the apportionment thereof; or

(e) the apportionment of costs; or

(f) the launching or prosecution of an appeal,

either party may apply to the Supreme Court for the determination of the matters in question and the court shall make such order as it considers reasonable having regard to the interests of the insured and the insurer in any recovery in the action or proposed action or in any offer of settlement.

(5) On an application under subsection (4), the only parties entitled to notice and to be heard thereon are the insured and the insurer, and no material or evidence used or taken upon the application is admissible upon the trial of an action brought by or against the insured or the insurer.

(6) A settlement or release given before or after action is brought does not bar the rights of the insured or the insurer, as the case may be, unless they have concurred therein.

These additional provisions were designed as a small code to

68. See, *Kellar v. Jackson*, [1962] O.W.N. 106 (H.C.); *Cleveland v. Yukish*, [1965] 2 O.R. 497; 51 D.L.R. (2d) 208 (Co. Ct.); *Sheridan v. Tynes* (1971), 19 D.L.R. (3d) 277; [1971] I.L.R. 1-441 (N.S.S.C., T.D.)

69. Enacted as S.N.S. 1966, c.79, but proclaimed January 1, 1969 as an amendment to R.S.N.S. 1967, c.148

govern the problems concerning carriage of the action. Obviously, the design, as indicated by subsections (3) and (4), was to give control of the action to the insurer whenever the insured was fully indemnified except for a deductible portion under his policy, and in all other cases the parties were to have the opportunity to apply to the Supreme Court to settle disagreements concerning the matters listed in subsection (4).

Unhappily, in Nova Scotia subsection (4) was enacted with a typographical error causing it to refer to itself in a nonsensical fashion. Even more unfortunately, the draft Uniform Part contained a typographical error by which subsection (4) referred to subsection (2), a reference equally otiose and nonsensical, though not nearly as obviously so until the provisions and their history and purpose are carefully analyzed and understood.

In most of the provinces the error was detected and the new auto insurance Part was enacted correctly with subsection (4) containing a reference to subsection (3). In some of the provinces the error was not detected and was enacted consistently with the Uniform Part. However, those provinces later discovered the error and amended subsection (4) to cause it to refer to subsection (3).

In Nova Scotia, having made our own unique typographical error, it required seven years after enactment, and four years after proclamation, to obtain a correction to subsection (4). By S.N.S. 1973 c.40, subsection (4) was amended cause it to refer to subsection (2)! There it sits today, a meaningless reference which, at least potentially, nullifies the statutory code to regulate disputes between insurer and insured concerning control of the third party action.

After eleven years we are in step with the draft Uniform Part, which was wrong. After how many years may we expect to get it right?

At the moment, it appears that there will be no amendment until a case arises which causes some minor scandal. After some insurance company, or some individual, has suffered inconvenience and cost to obtain a judicial admonition about the error in the Act, we may get a correction.

V. Reprise: What to do While Waiting for Nirvana?

Several provinces have enacted no-fault insurance plans to provide protection for traffic accident victims. Nova Scotia studied no-fault and has done nothing about enacting it.

I am not at all sure Nova Scotia should adopt a no-fault approach. What is crystal clear, however, is that our present scheme to protect traffic accident victims contains so many large holes that it looks like a piece of Swiss cheese.

The Motor Vehicle Act forbids anyone from driving a vehicle unless either the vehicle or the driver is insured.⁷⁰ This prohibition is flouted. Vehicle licences and drivers' licenses are issued by mail without any attempt at checking on insurance. Unless he has an accident, the only hazard facing the uninsured driver is the remote chance that a policeman will ask him to show proof of insurance. Even this can be finessed. It is notorious that some persons take insurance, obtain the pink card which represents proof of insurance, and then cancel the policy. The insubstantial pink card will then probably suffice to protect against the normal police inspection.

Apart from the few cases in which a vehicle owner or driver has been required to file a certificate proving financial responsibility (after a conviction or an uninsured accident), insurance companies are not required to notify the Registrar of Motor Vehicles of termination or lapse of insurance cover. The abuse of pink cards could be reduced if insurers were obliged to give such notice.

Another notorious practice is the one illustrated by *Wolfe v. Oliver*. To obtain a lower insurance premium, the purchaser of a vehicle procures its registration by a parent or spouse or, at any rate, someone in a more favourable rating category. The "owner of convenience" then buys a policy of insurance which is likely to benefit nobody except the insurer. In a situation like *Wolfe v. Oliver* the real vehicle owner has no protection, and his victim has no claim against the insurer. The arrangement is not entirely without a beneficiary; the insurer collects a premium.

Two legislative changes appear desirable. Section 221 of the Motor Vehicle Act could be altered to enlarge the liability of a person like Cleophas Oliver. It is only reasonable to exonerate vehicle owners from responsibility for injury done by a thief or someone using the owner's car truly in defiance of the owner's wishes. It is neither reasonable nor satisfactory to exonerate a nominal owner who is trying to assist in an insurance fraud.

A second solution to the same problem would be a statutory extension of the meaning of "consent" for the purposes of section 82(1) of the Insurance Act. We are willing to read section 98(5) as

70. R.S.N.S. 1967, c. 191. See, s.205A as added by S.N.S. 1970, c. 53

involving the insurer in strict liability notwithstanding that it was induced by misrepresentation to issue a policy. It would be no more unreasonable to give a larger definition to "consent to drive".

An increasingly critical deficiency is the low figure established as the statutory minimum liability limits and the ceiling on recovery from the public fund. At a time when responsible drivers are questioning whether \$300,000 is adequate cover, \$35,000 is risible. It is true that Nova Scotia is far from alone. Most Canadian provinces still prescribe limits of \$35,000. This simply means that as inflation bounds ahead, life and limb grow cheaper in other provinces as well. Since this is being written in Nova Scotia, I will content myself with suggesting that at least in Nova Scotia the minimum limits should be raised. Limits of \$50,000 for example, would have made the dispute in *MacKinnon* far less significant.

One of the recurrent themes in insurance litigation involves the impaired driver. Ontario has removed its counterpart to Statutory Condition #2(1) (a) and #2(2) (a) so that impaired driving may no longer be pleaded as a defence under the liability cover, though the insurer is permitted to insert an exclusion which prevents the insured from recovering anything in respect of damage to his own vehicle. Several other provinces have followed Ontario's lead.

On balance, I am not sure that Ontario's move is a desirable one to follow. However, I think the problems illustrated by the cases discussed in Part III, and the acute problems identified above in this Part, suggest that some significant amendment to the Insurance Act provisions governing automobile liability insurance, and to the Motor Vehicle Act is urgently required if we aspire to a sound, reliable, humane plan for the protection of traffic accident victims.